IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

C.R.P.(PD).No.1863 of 2004
and
C.M.P.No.17640 of 2004

V.Gurusamy .. Petitioner

vs.

Vedagiri .. Respondent

Civil Revision Petition filed against the order dated 21.9.2004 in C.M.P.SR.No.23508 of 2004 in A.S.No.10 of 2004 on the file of the IV Additional Judge, City Civil Court, Chennai against O.S.No.7636 of 1997 on the file of the XVIII Assistant Judge, City Civil Court, Chennai.

For petitioner : Mr.A.A.Lawrance

For respondent: Mr.P.Murugaiyan

ORDER

Aggrieved by the order dated 21.9.2004 of the learned IV Additional Judge, City Civil Court, Chennai in C.M.P.SR.No.23508 of 2004 in A.S.No.10 of 2004, this Civil Revision Petition has been filed.

2. Brief facts of the case are as follows:
The petitioner is the plaintiff who filed the suit for bare injunction. After trial, the suit was dismissed. The petitioner preferred an appeal in A.S.No.10 of 2004. During the pendency of the appeal, the petitioner filed a petition in C.M.P.SR.No.23508 of 2004 for amendment of the plaint by including the prayer for declaration. The said C.M.P.SR. was dismissed. Aggrieved by the same, this Civil Revision Petition has been filed.

3. Learned counsel appearing for the revision petitioner would contend that after the dismissal of the suit on 24.2.2003, the respondent has demolished the existing wall and re-constructed a wall with 4-1/2". Therefore, during the appeal stage, to bring it to the knowledge of the Court, the plaintiff wants to amend the plaint so that he can also get a declaration apart from mandatory injunction. Learned counsel for the petitioner pressed into service a judgment of the Madurai Bench of this Court reported in 2005 (2) TLNJ 1 (Rethinam alias Anna Samuthiram Ammal and others vs. Syed Abdul Rahim), wherein, P.K.Misra,J has held as follows:

"6. Section 16 of the Code of Civil Procedure (Amendment) Act, 2002, contains provisions relating to Repeal and Savings. Provision under Section 16, so far as relevant for the present purpose, is as follows:

"16. Repeal and Savings ..... (1) ....
(2) .....
(a) ....
(b) the provisions of Rules 5, 15, 17 and 18 of Order 6 of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act. ;
(c) ..... "
The aforesaid provision makes it clear that the provisions of Order 6, Rule 17, which had been omitted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and which had been inserted by Section 7 of the Code of Civil Procedure (Amendment) Act, 2002 shall not apply to in respect of any pleadings filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act 1999 and Section 7 of the Code of Civil Procedure (Amendment) Act 2002. As already indicated, the Code of Civil Procedure (Amendment) Act 1999 and the Code of Civil Procedure (Amendment) Act 2002 came into force with effect from 01.07.2002. From the bare reading of the provisions contained in Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act 2002, it is clear that such amended provision as contained in proviso shall not apply to in respect of any pleadings filed before the commencement of the amended Code. Pleadings in this context obviously include the plaint and written statement. Therefore, in respect of the plaint or written statement filed before 01.07.2002, the proviso to Order 6, Rule 17 would have no applicability.

7. In the present case, the trial court has relied upon the proviso to Order 6, Rule 17 of the Code of Civil Procedure (Amendment) Act 2002. The amendment of plaint was necessitated on account of the fact that as per the plaintiffs' case, the defendant has disturbed the possession during the pendency of the suit which necessitated the relief for declaration of title and recovery of possession. Such an amendment, by applying the principles relating to amendment of plaint as applicable before 01.07.2002, would have been allowed notwithstanding the fact such amendment was sought for after the commencement of actual trial. The trial Court has rejected the application for amendment mainly applying the proviso as interpreted by the learned Judge of this Court in the decision reported in 2004 (2) CTC 742. However, the clear language contained in Section 16(2)(b) of the Code of Civil Procedure (Amendment) Act 2002 makes it clear that the petition for amendment under Order 6, Rule 17 should have been considered dehors the proviso which had been introduced for the first time in the Code of Civil Procedure (Amendment) Act 2002. The impugned order is, therefore, liable to be set aside. ... "

4. In the present case also, because the existing wall was demolished and a wall was re-constructed by the respondent, the plaintiff who originally filed the suit for bare injunction, now wanted the relief of declaration apart from mandatory injunction. Therefore, there is necessity to amend the plaint. Admittedly, the plaint was filed in 1997 much before the amended Civil Procedure Code came into existence. Therefore, the impugned order is set aside. The Civil Revision Petition is allowed. The plaintiff is permitted to amend the plaint as prayed for. No costs. C.M.P. is closed.

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Copy to

1. IV Additional Judge,

City Civil Court,
Chennai.

2. XVIII Assistant Judge,
City Civil Court,
Chennai.

[sant 8383]